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SERVICE DATE – OCTOBER 19, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35045

DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY—AMENDED TRACKAGE RIGHTS EXEMPTION—DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

STB Finance Docket No. 35046

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY—AMENDED TRACKAGE RIGHTS EXEMPTION—DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY

STB Finance Docket No. 35047

WISCONSIN CENTRAL LTD.—TRACKAGE RIGHTS EXEMPTION—DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

STB Finance Docket No. 35048

WISCONSIN CENTRAL LTD.—TRACKAGE RIGHTS EXEMPTION—DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY

STB Finance Docket No. 35049

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—WISCONSIN CENTRAL LTD.

STB Finance Docket No. 35050

DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—WISCONSIN CENTRAL LTD.

Decided: October 16, 2009

By six verified notices of exemption filed on June 14, 2007, and served and published in the Federal Register on June 29, 2007, Duluth, Winnipeg and Pacific Railway Company (DWP), Duluth, Missabe and Iron Range Railway Company (DMIR), and Wisconsin Central Ltd. (WCL) (collectively, CNR), invoked the class exemption procedures at 49 CFR 1180.2(d) (7) to acquire (in 4 cases) and amend (in 2 cases) trackage rights over each others' lines. The exemptions

became effective on July 14, 2007, but have not yet been implemented. On July 17, 2007, United Transportation Union (UTU or petitioner), representing trainmen on DMIR and WCL and both engineers and trainmen on DWP, filed a petition to revoke the six exemptions, contending that their sole purpose was to abrogate DWP's and DMIR's existing collective bargaining agreements and to replace them with a version of WCL's collective bargaining agreement. We find that some of the issues raised by petitioner are not ripe for review, and that the record does not otherwise afford an adequate basis for revoking the notices pursuant to 49 U.S.C. 10502(d).

BACKGROUND

DWP, DMIR, and WCL are indirect subsidiaries of Canadian National Railway Company (CN).¹ DWP's and DMIR's lines extend north from the Twin Ports of Duluth, MN and Superior, WI, to Shelton Junction, MN. For most of this distance, between Shelton Junction and Nopeming Junction, MN, DWP and DMIR operate separate, parallel rail lines and have reciprocal, overhead trackage rights that allow them to operate over each others' lines using their own crews. Beyond Shelton Junction: (1) DWP's line extends to Ranier, MN, on the Canadian border near DWP's interchange with CN; and (2) DMIR's line extends west to Hibbing, north to Minora, and east to Jordan and Two Harbors, MN. WCL's main line extends south from Superior to Chicago, IL, via Fond du Lac, WI. The lines of the three rail carriers meet at South Itasca, WI, just south of the Twin Ports. They interchange traffic at DWP's Pokegama Yard, just to the west of South Itasca. WCL has trackage rights over DWP/DMIR from South Itasca to Pokegama Yard.²

The notices of exemptions in STB Finance Docket Nos. 35045 and 35046 make minor modifications to the existing reciprocal trackage rights between DWP and DMIR. They are incidental to the new, reciprocal, overhead trackage rights in the four other notices of exemption at issue here, which extend each carrier's operating district through, rather than to, the Twin Ports. Specifically, in STB Finance Docket No. 35047, DMIR granted WCL overhead trackage rights between South Itasca and Shelton Junction via Carson, MN. In STB Finance Docket No. 35048, DWP granted WCL overhead trackage rights between Nopeming Junction and Ranier. And in STB Finance Docket Nos. 35049 and 35050, WCL granted DWP and DMIR,

¹ DWP, DMIR, and WCL, like CN's other U.S. rail carrier subsidiaries, are held by Grand Trunk Corporation, a wholly owned, direct, noncarrier subsidiary of CN. CN and its predecessors have controlled DWP since the early 1900s. CN acquired control of WCL in 2001, see Canadian National Ry. Co.—Control—Wisconsin Central Transp. Corp. et al., 5 S.T.B. 890 (2001) (CN—WCL), and of DMIR in 2004, see Canadian National Railway Company and Grand Trunk Corporation—Control—Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company, STB Finance Docket No. 34424 (STB served Apr. 9, 2004) (CN—DMIR). Both CN—WCL and CN—DMIR were conditioned on the employee protective conditions adopted in New York Dock Ry. —Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).

² See Wisconsin Central Ltd—Exemption—Trackage Rights—Duluth, Missabe and Iron Range Railway Company, Finance Docket No. 31881 (ICC served June 6, 1991).

respectively, overhead trackage rights between South Itasca and Fond du Lac. Each trackage rights agreement or amendment to an existing trackage rights agreement limits the trackage rights carrier to overhead movements, reblocking of cars within the same train, and setting out cars requiring servicing.

The purpose of the proposed trackage rights, according to CNR, is to permit better crew utilization among these commonly controlled railroads. Specifically, CNR contends that its trains frequently arrive at Pokegama Yard, the crew change point, with remaining crew service hours, and that these hours are wasted because the crews cannot operate beyond Pokegama Yard. By allowing DWP and DMIR trains to operate south, and WCL trains to operate north, of Pokegama Yard, CNR claims that these trackage rights agreements will improve crew utilization, permit greater operating flexibility, and reduce train delays, allowing more efficient and timely operations in the Twin Ports area.

CNR maintains that the DWP, DMIR, and WCL crews will at all times remain subject to their own respective collective bargaining agreements, which will neither be modified nor diminished. Additionally, CNR claims that existing employee work levels will remain evenly distributed because the proposed trackage rights are reciprocal. WCL crews operating north of the Twin Ports will be balanced by DMIR and DWP crews operating south of the Twin Ports. To the extent employees are adversely affected by an incidental net loss of work, CNR points out that they will be protected by the conditions imposed in Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978) (N&W), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980) (Mendocino).

PRELIMINARY MATTER

In decisions served on August 15, October 11, and December 7, 2007, and February 14, April 17, July 3, August 12, and October 27, 2008, the Board granted CNR's requests to hold UTU's petition to revoke in abeyance to give the parties time to resolve their dispute. CNR filed a reply to UTU's petition to revoke on October 28, 2008. UTU filed a motion for leave to file a surreply and a surreply on November 18, 2008, and CNR filed a rebuttal on December 8, 2008.

The Board's regulations at 49 CFR 1104.13(c) prohibit parties from filing replies to replies. Here, due to the lengthy time consumed by the parties in attempting to settle this dispute, CNR did not reply to UTU's petition until 15 months after it was filed. Because CNR had, in effect, 15 months to prepare and file its reply, and to see the evolution of the case through more than a year of negotiations, there is good cause to give UTU an opportunity to address the material in that reply. That is especially so where, as here, CNR is not opposed. We will grant UTU's motion for leave to file a surreply and accept into the record both UTU's surreply and CNR's unopposed rebuttal.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), the Board may revoke an exemption in whole or in part if it finds that regulation is necessary to carry out the rail transportation policy (RTP) set forth in 49 U.S.C. 10101. The party seeking revocation has the burden of proof and petitions to revoke

must be based on reasonable, specific concerns. I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998).³ And the Board may revoke an exemption to protect the integrity of its process.

If a notice contains false or misleading information, the exemption is void ab initio. See 49 CFR 1150.32(c) and 1180.4(g)(1)(ii). Under Board precedent, whether a party invoking a class exemption has provided false or misleading information turns on whether the party has, in its notice, represented that it may lawfully invoke the class exemption when, in fact, it cannot.⁴

False and Misleading. UTU claims that the notices contain false and misleading information but does not point to any false or misleading facts or statements. At the outset, we note, however, that the notices on their face appear to contain accurate descriptions of the trackage rights being conveyed. They state their purpose, to “enhance operational efficiency,” and disclose the common control relationship among the parties. The notices filed, and the trackage rights agreements to which they refer, appear to fall squarely within the parameters of the class exemption at 49 CFR 1180.2(d)(7).

UTU’s claim that the notices contain false and misleading information is based on two points. First, because the trackage rights are between commonly controlled rail carriers, UTU contends they do not require Board authorization. Second, UTU contends that the notices constitute nothing more than attempts to circumvent: (1) labor agreements that the railroads have entered into with the UTU; and (2) requirements imposed for the benefit of employees in connection with prior agency actions or bargained for in labor agreements under the Railway Labor Act, 45 U.S.C. 153 (RLA). We discuss these claims below.

Trackage Rights Between Commonly Controlled Rail Carriers. UTU contends that the proposed transactions are shams, asserting that there is no need for the Board to approve trackage rights when they are between commonly controlled rail carriers. We disagree. Trackage rights agreements have long required Board authorization under 49 U.S.C. 11323(a)(6) regardless of whether the involved carriers are commonly controlled. See, e.g., Gateway Western Railway Company—Trackage Rights Exemption—the Kansas City Southern Railway Company, STB Finance Docket No. 33894 (STB served Aug. 3, 2000); The Kansas City Southern Railway Company—Trackage Rights Exemption— Gateway Western Railway Company and Gateway

³ When the Board considers whether to revoke an exemption, we address those aspects of the RTP that would be relevant in an application proceeding. See Village of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991).

⁴ See R.J. Corman Railroad Company/Pennsylvania Lines, Inc.—Abandonment Exemption—in Clearfield, Jefferson, and Indiana Counties, PA, STB Docket No. AB-491 (Sub-No. 2X) slip op. at 2-3 (STB served Dec. 11, 20089; Buffalo & Pittsburgh Railroad Inc.—Abandonment Exemption—in Erie and Cattaraugus Counties, NY, STB Docket No. 369 (Sub-No. 7C), slip op. at 2 (STB served Nov. 4, 2008).

Eastern Railway Company, STB Finance Docket No. 33780 (STB served Sept. 16, 1999); Norfolk and Western Railway Company—Trackage Rights Exemption—Norfolk Southern Railway Company, STB Finance Docket No. 32961 (STB served Aug. 22, 1997); Missouri Pacific Railroad Company—Trackage Rights Exemption—Union Pacific Railroad Company, STB Finance Docket No. 32656 (STB served May 17, 1996); Baltimore and Ohio Railroad Company—Trackage Rights Exemption, ICC Finance Docket 30562 (ICC served Oct. 19, 1984).

UTU likens the transactions here to the one at issue in Canadian National Railway Company—Contract to Operate—Grand Trunk Western Railroad Inc. and Duluth, Winnipeg and Pacific Railway Company, Finance Docket No. 32640 (ICC served April 18, 1995) (CN—Contract), which the Interstate Commerce Commission (ICC), our predecessor, found not subject to its jurisdiction under 49 U.S.C. 11343(a)(2). There, as here, rail labor challenged the ICC’s jurisdiction, arguing that the contract to operate proposed by CN was a sham solely intended to abrogate existing labor agreements. However, the proposed transactions here are distinguishable from the one at issue in CN Contract. There, the agency found that the proposed changes—a proposal to integrate marketing and management functions of the CN-controlled rail carriers—were not intended to, and did not, result in operational or other changes requiring Board approval. Here, it is not questioned that the proposed transactions involve new or amended trackage rights that will result in operational changes.

Circumvention of Existing Agreements and Imposed Requirements. UTU’s core complaint is that the notices of exemption are a ruse whose sole purpose is to abrogate UTU’s existing collective bargaining agreements with DWP and DMIR and replace them with a version of the WCL collective bargaining agreement. In support, UTU says that on September 24, 2007, shortly after the exemptions became effective, CN sent UTU Section 4 New York Dock notice.⁵ In it, CN announced that to achieve the efficiency, reliability, and competitive objectives of the CN—WCL and CN—DMIR acquisitions, “it is necessary to consolidate the train operations of [DWP, DMIR, and WCL] into one territory.” See UTU Surreply at 8 and Exhibit A.

According to UTU, negotiations with CN ensued over the latter’s proposal to replace UTU’s individual collective bargaining agreements with DWP, DMIR, and WCL with a single collective bargaining agreement. During these negotiations, UTU claims CN said that: (1) it wanted to eliminate DMIR’s Carnegie Pension Plan, Healthcare Plan, and welfare package, its collective bargaining agreements pertaining to road/yard distinction, mileage limitations, and crew consist moratoria; and all of its brakeman/helper positions; (2) DMIR had to be granted the unfettered right to force employees to any property or location regardless of their home carrier affiliation; and (3) the elimination of the pension and healthcare plan and the welfare package

⁵ Article 1, Section 4, of New York Dock, 360 I.C.C. at 85, requires railroads to give 90-days written notice of any contemplated transaction or reorganization flowing from an approved transaction that “may cause the dismissal or displacement of any employees, or rearrangement of forces” and provides for negotiations and binding arbitration if the parties are unable to agree on the terms and conditions. New York Dock conditions are generally imposed when the Board approves consolidation transactions between large railroads.

were non-negotiable. UTU submitted draft implementing agreements as evidence of CN's proposals during these New York Dock negotiations.

UTU also claims that CN's positions in negotiations were contrary to: (1) CN's past representations made in proceedings before the Board—that it would not replace existing applicable agreements; and (2) the moratorium provisions in certain existing RLA agreements. In support of these claims, UTU details CNR's past representations and the history and provisions of the relevant agreements.

In response, CNR asserts that UTU is seeking “to convert these proceedings into a forum to debate the New York Dock Section 4 notice that has been served by [CN] and negotiated by the parties in other, different Board dockets.” See CNR Rebuttal at 2. CNR argues that this “other case has its own arbitral and Board review procedures under New York Dock, and should not be preempted by a wrongful broadening of the limited issues here.” Id. at 5.

Here, the record indicates that petitioner's concerns relating to the Section 4 notice stem from other proceedings, as the Section 4 notice and draft implementing agreements submitted by UTU in support of its argument reference the CN—WCL and CN—DMIR control proceedings and the New York Dock employee protective conditions imposed in them.

In any event, the Board does not consider implementing agreement disputes in the first instance. Barring an agreement resolving this dispute, the parties may seek arbitration under the auspices of a neutral arbitrator with experience in labor matters. This is the procedure adopted in both the Mendocino and New York Dock employee protective conditions. If negotiations concerning the implementation of the trackage rights at issue here (or other actions CN may be pursuing under New York Dock) proceed to arbitration, UTU's evidence of CN's past representations, commitments, and agreements may be relevant to resolving the issues raised by UTU here. If UTU, CNR, or CN wants to take issue with the results of arbitration, it may appeal that result to us under the standards of review that we have established for such cases. See Chicago & North Western Tptn. Co.—Abandonment, 3 I.C.C.2d 729, 736 (1987), aff'd sub nom. International Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 336 (D.C. Cir. 1988). The relief sought in the instant petition regarding the negotiations between UTU and CNR or UTU and CN is therefore premature.

Our authorization of the trackage rights at issue here is limited to the scope of the trackage rights contained in these notices of exemption. We note that the immunity from all other law regarding transactions approved pursuant to 49 U.S.C. 11323 or 11326 permits carriers to modify existing collective bargaining agreements only as necessary to implement an approved transaction, and that certain “rights, privileges, and benefits [such as vested health care and pension plans] are protected absolutely.” See United Transportation Union v. STB, 108 F.3d 1425, 1430 (D.C. Cir. 1997). To the extent employees are adversely affected by changes that are necessary to implement these trackage rights, they will be eligible for benefits under the Mendocino employee protective conditions.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU's motion for leave to file a surreply is granted. UTU's surreply and CNR's rebuttal are accepted into the record.

2. UTU's petition to revoke the exemptions is denied.

3. This decision is effective on the date of service.

By the Board, Vice Chairman Nottingham and Commissioner Mulvey, Chairman Elliott is not participating.

Anne K. Quinlan
Acting Secretary